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Moratoriums on the use of the death penalty

Report of the Secretary-General

Summary

The present report surveys respect for the rights of those sentenced to death as set out in the international human rights treaties and the guidelines established by the Economic and Social Council in 1984. Drawing on contributions of Member States, the report surveys various motivations for establishing a moratorium on or abolishing the death penalty, as well as those for retaining the death penalty. It also includes up-to-date statistical information on the worldwide use of the death penalty, including moratoriums established in States that have not abolished this form of punishment, together with relevant developments since the sixty-second session of the General Assembly. The report concludes by confirming the global trend towards abolition of the death penalty, the important role played by moratoriums in those States that seek to abolish it and possibilities for further work on the issue.

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I. Introduction

1. In resolution 62/149, entitled "Moratorium on the use of the death penalty", the General Assembly expressed its deep concern about the continued application of the death penalty and called on all States that still maintain the death penalty: (a) to respect international standards that provide safeguards guaranteeing protection of the rights of those facing the death penalty, in particular the minimum standards, as set out in the annex to Economic and Social Council resolution 1984/50; (b) to provide the Secretary-General with information relating to the use of capital punishment and the observance of the safeguards guaranteeing protection of the rights of those facing the death penalty; (c) to restrict progressively the use of the death penalty and reduce the number of offences for which it may be imposed; and (d) to establish a moratorium on executions with a view to abolishing the death penalty. The Assembly also called on States that have abolished the death penalty not to reintroduce it.

2. In paragraph 4 of that resolution the Assembly requested the Secretary-General to report to it on the implementation of the resolution. On the basis of that request, the Office of the United Nations High Commissioner for Human Rights on behalf of the Secretary-General, sent notes verbales to all Member and observer States on 17 March 2008 requesting relevant information to enable the Secretary-General to prepare his report. Input was received from 51 Member States.[1] Further information was provided by non-governmental organizations.[2]

3. In submitting the present report, the Secretary-General draws the Assembly's attention to additional relevant information presented in his reports on the death penalty to the Human Rights Council[3] and his quinquennial reports to the Economic and Social Council on capital punishment.[4]

4. Attention is also drawn to previous resolutions adopted by the General Assembly in relation to the death penalty. In its resolution 2857 (XXVI) of 20 December 1971 the Assembly affirmed, that

> in order to fully guarantee the right to life, provided for in article 3 of the Universal Declaration of Human Rights, the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries.

That objective was reaffirmed by the Assembly in its resolution 32/61 of 8 December 1977, in which it also expressed the desirability of continuing and

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[1] Albania, Algeria, Andorra, Argentina, Austria, Barbados, Belarus, Belgium, Bhutan, Bosnia and Herzegovina, Botswana, Canada, Chile, Colombia, Costa Rica, Croatia, Cuba, Czech Republic, Denmark, Estonia, France, Georgia, Germany, Greece, Guatemala, Ireland, Italy, Kuwait, Latvia, Libyan Arab Jamahiriya, Lithuania, Luxembourg, Mauritius, Moldova, Morocco, Netherlands, New Zealand, Norway, Poland, Portugal, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Togo, Trinidad and Tobago, Tunisia and Venezuela (Bolivarian Republic of). The original contributions are available for consultation at the Secretariat.

[2] American Civil Liberties Union, Amman Centre for Human Rights Studies, Amnesty International, Commonwealth Human Rights Initiative, Hands off Cain, Human Rights Watch and Japan Federation of Bar Associations.

[3] The most recent being A/HRC/8/11.

[4] The most recent being E/2005/3.

expanding the consideration of the question of capital punishment by the United Nations.

II. Global use of the death penalty

A. Statistics

5. The General Assembly's call for a moratorium on executions with a view to abolishing the death penalty needs to be considered in the light of the current practice among Member States regarding the death penalty. Following the practice adopted in quinquennial reports, the present report classifies countries as completely abolitionist, abolitionist for ordinary crimes, de facto abolitionist or retentionist. Countries that are abolitionist for all crimes, whether in peacetime or in wartime, are regarded as completely abolitionist. Countries that are regarded as abolitionist for ordinary crimes are those that have abolished the death penalty for all ordinary offences committed in time of peace. In such countries, the death penalty is retained only for exceptional circumstances, such as those that may apply in time of war for military offences, or for crimes against the State, such as treason. Countries that retain the death penalty for ordinary crimes but have not executed anyone during the past 10 years or more are considered de facto abolitionist. All other countries are defined as retentionist, meaning that the death penalty is in force and executions do take place, although in many retentionist countries such executions might be quite rare.

6. As at 1 July 2008, 141 countries had abolished the death penalty in law or practice. Of those, 93 are completely abolitionist, 10 are abolitionist for ordinary crimes only and a further 38 can be considered de facto abolitionist. The remaining 56 countries and territories retain and practise the death penalty.

7. Reliable figures on the application of the death penalty are difficult to obtain because a number of States retaining capital punishment do not provide relevant statistics. Estimates of the minimum figures of people executed in 2007 range from 1,252[5] to over 8,000,[6] in 21 to 24 countries. These are minimum figures; the actual number of executions is assumed to be much higher. In its resolutions on the death penalty,[7] the Commission on Human Rights called upon States that maintain the death penalty to "make available to the public information with regard to the imposition of the death penalty and to any scheduled execution".

B. Developments since the adoption of resolution 62/149

8. There have been a number of developments in the use of the death penalty since the adoption of resolution 62/149 by the Assembly on 18 December 2007. One country, Uzbekistan, abolished the death penalty for all crimes, effective as from 1 January 2008. Honduras, which had already abolished the death penalty, ratified the Second Optional Protocol to the International Covenant on Civil and Political

[5] Amnesty International

[6] Hands off Cain, *The Death Penalty Worldwide*, 2008.

[7] The last such resolution being resolution 2005/59.

Rights in April 2008. In the same period, no countries have reintroduced the death penalty.

9. A number of States are in the process of abolishing or considering abolishing the death penalty. In February 2008, the Legislation Committee of the Russian State Duma submitted a bill to the lower house of parliament that would officially abolish the death penalty. In 2008 Poland commenced the process of ratification of the Second Optional Protocol to the International Covenant on Civil and Political Rights. Latvia reports that on 19 May 2008 its parliament endorsed a law allowing the ratification of Protocol 13 to the European Convention on Human Rights. Chile reports that there are currently several bills before its congress providing for abolition of the death penalty, as well as draft agreements aimed at the ratification of international instruments that impose similar obligations. These include: (a) an amendment to the Constitution; (b) a bill to eliminate the death penalty from the code of military justice; (c) a procedure leading to ratification of the Second Optional Protocol of the International Covenant on Civil and Political Rights; and (d) a draft agreement to ratify the Protocol to the American Convention on Human Rights to Abolish the Death Penalty.

10. As reported by the Government of Cuba, on 28 April 2008 the President commuted a large number of death sentences to prison terms. According to Amnesty International, about 50 individuals were reprieved, with only three remaining on death row. On 14 March 2008, the President of Guatemala vetoed a law adopted by parliament that proposed the termination of the country's moratorium on the death penalty, which has been in place since 2000. In doing so the President stated, that the reintroduction of the death penalty would be contrary to article 4 (3) of the American Convention on Human Rights, which prohibits reintroduction in States that have abolished the death penalty. In the United States of America, following the decision of the Supreme Court to consider the constitutionality of lethal injection as a method of execution in *Baze v. Commissioner of the Kentucky Department of Corrections*, a de facto moratorium on executions lasted from September 2007 until the Court rejected the petitioners' arguments in April 2008. Also in the United States, an execution took place in May 2008 in the state of Georgia. Trinidad and Tobago reported that, pending the decision of the High Court in *Dottin v. The Attorney General*, there is a stay on the execution of any prisoner who was on death row on 7 July 2004, that being the date on which the Privy Council overturned its earlier jurisprudence on the mandatory nature of the death penalty for murder.

11. In a note verbale addressed to the Secretary-General dated 11 January 2008, the Permanent Missions of 58 Member States to the United Nations in New York expressed, their "persistent objection to any attempt to impose a moratorium on the use of the death penalty or its abolition in contravention to existing stipulations under international law".[8]

C. Trends

12. Trends in figures on the application of the death penalty can be gleaned from the quinquennial reports of the Secretary-General, as updated by the Secretary-General's report to the Human Rights Council and its predecessor, the Commission

[8] A/62/658.

on Human Rights. The quinquennial reports have been prepared at five-yearly intervals since 1975, covering the period since 1969. However, until the sixth quinquennial report, covering the period from 1994 to 2000, figures reflected only those reported by Member States. As the level of reporting was relatively low (particularly among retentionist States), the sixth report relied on information derived from a variety of other sources beyond governmental responses, and included figures for the situation at the beginning of the reporting period (1994) and at the end (2000). The quinquennial reports thus provide comparable figures from 1994 onward.

Figures from quinquennial reports

Reporting period ending	*Abolitionist*	*Abolitionist for ordinary crimes only*	*De facto abolitionist*	*Retentionist*	*Reintroductions*	*Resumed executions*
1993	55	14	30	94	4	0
2000	76	11	36	71	1	9
2003	79	12	41	62	0	3
July 2008	93	10	38	56	0	1

13. Four States reintroduced the death penalty in the quinquennium 1989-1993, but no de facto abolitionist States resumed executions. From 1994 to 2000, one State reintroduced capital punishment, and nine countries ceased to be de facto abolitionist by resuming executions. No abolitionist countries reintroduced the death penalty during the period 1999-2003, and three de facto abolitionist countries resumed executions.

14. As has been noted by successive reports of the Secretary-General on the death penalty, the global trend is towards abolition of capital punishment.[9] This trend has been constant since the first report of the Secretary-General, in the 1970s. In 1976, 16 States could be described as totally abolitionist. Today the figure is 93. In the early 1990s, the rate of abolition (at almost four States a year) was described in the fifth quinquennial report as "quite remarkable".[10] This pace continued despite the disappearance of factors such as the formation of significant numbers of new Member States after 1989. Although the pace has slowed somewhat in recent years, the trend continues.[11] The strength of the trend is also illustrated by the lack of reintroductions of the death penalty by States that had earlier abolished it. The most recent quinquennial report (covering the period 1999-2003) reported no abolitionist countries as having reintroduced the death penalty during the period (compared with one State in the previous quinquennium, and four in the quinquennium before that). This situation holds. Furthermore, although three de facto abolitionist States had resumed executions in the period, this was far fewer than the nine that had done so in the previous biennium. Since the last quinquennial report, only one de facto abolitionist country has resumed executions after a period of 10 or more years. In January 2007 the Secretary-General recognized the "growing trend in international

[9] See, for example, A/HRC/8/11.

[10] E/1995/78, para. 89.

[11] E/2005/3, para. 40.

law and in national practice towards a phasing out of the death penalty".[12] It should be recalled that in paragraph 6 of its general comment 6 on article 6 of the International Covenant on Civil and Political Rights, the Human Rights Committee stated that article 6

> "refers generally to abolition [of the death penalty] in terms which strongly suggest ... that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life".

The trend towards abolition is also reflected in the increasing number of ratifications of international instruments providing for the abolition of the death penalty.[13] The stated reasons supporting this trend, together with reasons supporting a retentionist position, are outlined in section III below.

15. A further trend, and one that is identified by a number of contributions to the present report, is that of the process whereby States arrive at abolishing the death penalty. Reported experience suggests that, absent a traumatic national event, States will move from a retentionist position to a restriction in its application, a moratorium (often de facto) and finally abolition. This is reflected in the statistics, showing a steady decrease in retentionist States, mirrored by a steady increase in abolitionist States, and a stable number of States implementing a de jure or de facto moratorium at any particular time.

III. Views reported on the death penalty

16. The contributions received from Member States contained a significant amount of material outlining various States' positions in respect of the death penalty.

A. Reasons for abolition or establishing a moratorium

17. Some States supporting abolition reported on their reasons and motivations for doing so. Six primary reasons can be identified. The first is a focus on the respect for human life. Thus, San Marino stated that it placed the primary good of human life over and above the punitive power of the State. The Bolivarian Republic of Venezuela refers to its current Constitution as embodying the guarantee of life as one of the supreme values informing the State, and Tunisia's de facto moratorium is based "on respect for human life". A number of States that maintain the death penalty, such as Botswana, also refer to constitutional guarantees of the right to life. Some States, such as Mauritius, thus saw the progressive abolition of the death penalty as contributing to the progressive protection and development of human rights. For Slovakia, abolishing the death penalty is one of the most important steps a country can take to secure human rights for everyone in its jurisdiction.

18. A second reason advanced is that capital punishment does not deter criminality more than any other form of punishment. Italy drew attention to academic studies in

[12] Secretary-General's press conference, 11 January 2007.

[13] The Second Optional Protocol to the International Covenant on Civil and Political Rights, Protocols 6 and 13 to the European Convention on Human Rights and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty.

Germany and Canada revealing a lowering of murder rates after abolition. Amnesty International has drawn attention to a recent survey of research on the death penalty and homicide rates, conducted for the United Nations in 1988 and updated in 2002, which concluded: "it is not prudent to accept the hypothesis that capital punishment deters murder to a marginally greater extent than does the threat and application of the supposedly lesser punishment of life imprisonment".[14] France opined that the application of the death penalty is not so much a way of fighting criminality as it is a sign of the failure of the justice system. Italy recalled the view that, since execution is transient, long-term imprisonment is a more powerful deterrent. Some States, such as Slovenia, were of the view that a better deterrent to violent crime lies in ensuring that criminals have a high chance of capture and punishment within a reasonable time.

19. A third reason is the finality of the death penalty, such that errors in the criminal justice system become irreparable. A number of States recalled that miscarriages of justice are inevitable in any legal system. Amnesty International has noted that whenever the death penalty is used, there is a grave risk that individuals are executed for crimes they did not commit, as has been shown by instances of individuals being exonerated after conviction, often on the basis of evidence provided by DNA testing. Amnesty International is of the view that it is impossible to determine how many innocent people have been put to death, as judicial reviews or investigations into possible error rarely occur after execution.

20. A fourth reason is to avoid responses based on retribution. Colombia reported that it has renounced the concept of retributive justice as a core element of the penal system, instead giving priority to resocialization, re-education and reintegration of the convicted persons into society. This position is supported by Morocco.

21. A fifth reason, advanced by States such as Slovenia, is that the death penalty constitutes cruel, inhuman and degrading treatment, which is a violation of international law. This is a result of the execution itself, as well as the cruelty of the convicted person being forced to wait on death row (often for many years) contemplating execution. Conditions of detention on death row may also amount to torture or cruel, inhuman and degrading treatment, with the organization Hands off Cain reporting that death-row prisoners often seek to be executed as soon as a possible to escape the abominable conditions of detention.

22. A sixth reason advanced for abolishing the death penalty is that its application is discriminatory, in that it is often used disproportionately against the poor, minorities and members of racial, ethnic and religious communities. It should be noted that, in its resolutions on the death penalty, the Commission on Human Rights condemned "the continuing application of the death penalty on the basis of any discriminatory legislation, policies or practices".[15]

B. Reasons for retaining the death penalty

23. States retaining the death penalty referred to their sovereignty in terms of choosing whether or not and when to abolish the death penalty. Barbados indicated

[14] Roger Hood, *The Death Penalty: A Worldwide Perspective* (Oxford, Clarendon Press, third edition, 2002), p. 230.

[15] Resolution 2005/59, para. 2.

that it respects the decision of those countries that have abolished the punishment, and expects the same respect for its decision to retain it, even in circumstances where no execution has taken place for almost 25 years. States such as Botswana, Barbados and Trinidad and Tobago referred to their vigorous democracies, independent judiciaries and criminal process guarantees in applying the death penalty. As the punishment is not prohibited in international law, States have the sovereign right to retain it for the most serious crimes, as long as it is not applied in a summary and arbitrary way, including through respect for the Economic and Social Council safeguards. Amnesty International has indicated that since its founding, the United Nations has taken action on human rights matters in many areas that would formerly have been considered solely within a State's domestic jurisdiction. In that time the United Nations has adopted, and very many States have ratified, numerous human rights treaties, thereby recognizing the obligation that a range of domestic criminal justice matters, such as the death penalty, must meet international human rights standards.

24. Cuba stated that — although it maintains the death penalty — it understands and respects the arguments for universal abolition. In these arguments, however, the context and special features of each country must be borne in mind. The Bolivarian Republic of Venezuela, which abolished the death penalty in the nineteenth century, was also of the view that any process of change in respect of the death penalty must take into account the system of values and beliefs of the society concerned.

25. Other States, such as Kuwait, indicated that the application of the death penalty is part of sharia law, on which many legal systems are built. According to Kuwait, to demand the abolition of the death penalty is to demand something that is incompatible with sharia and thus with the State's general system of law. For the Libyan Arab Jamahiriya, which retains and applies the death penalty, a State's decision to retain capital punishment is a manifestation of the right to freedom of religious belief. For countries such as Morocco, which is in the process of reflection on the death penalty, the sharing of views and positions in the debate on the death penalty is a healthy phenomenon.

26. Some States referred to the relevance of public opinion in the decision to retain or abolish the death penalty. Belarus reported that in a referendum held in 1996 a majority of the population voted to retain the death penalty. The United Kingdom of Great Britain and Northern Ireland referred to the proposals to reintroduce the death penalty in free votes on the issue held in Parliament until 1998, all of which were defeated. Canada signalled that is has no intention of reopening the national debate on the death penalty, and Slovakia reported that despite calls at the national level for reintroduction, the Government will hold firm in the view that reintroduction would be an unprecedented step against respect for human rights.

C. The death penalty as a foreign-policy theme

27. For a number of States, the universal abolition of the death penalty is a key or principle foreign-policy objective. Italy referred to its initiatives in the General Assembly, the former Commission on Human Rights and the Council of Europe. France, Portugal and the United Kingdom underlined their foreign assistance related to the abolition of the death penalty, particularly through judicial training

programmes. Germany indicated that the goal of universal abolition has become an integral part of its human rights policy, while for Sweden, universal abolition is one of the eight thematic human rights priorities. New Zealand funded the documentation of the successful campaign to abolish the death penalty in the Philippines.

28. States members of the European Union reported on its position and activities regarding the death penalty. All European Union member States are fully committed to prohibiting the death penalty and implement that prohibition in practice, thus reflecting article 2 of the European Union Charter of Fundamental Rights, which provides that no one shall be condemned to the death penalty or executed. The "Guidelines on European Union policy towards third countries on the death penalty", adopted in Luxembourg on 29 June 1998, are currently being updated. Where relevant, the European Union raises the issue of the death penalty in its dialogues with third countries, calling for its abolition, if necessary with the immediate establishment of a moratorium. Where its use is maintained, the European Union emphasizes that States should use the death penalty only in accordance with internationally recognized minimum standards and should maintain maximum transparency, including by publishing information about the death penalty and its use. When the European Union becomes aware of individual death penalty cases that violate minimum standards, it will consider making specific demarches, 80 having been undertaken since 2005. The European Union raises the issue of the death penalty in relevant multilateral forums. It further encourages and offers bilateral and multilateral cooperation; for example, it collaborates with civil society, including in the legal field with the aim of establishing a fair and impartial judicial process for criminal cases. Some 30 projects aimed at the abolition of the death penalty have been funded globally by the European Commission since 1994, with an overall budget of about €15 million.

D. Views on the process towards abolition

29. States' contributions also highlighted the importance of the process towards a moratorium on or abolition of the death penalty, many describing it as a midterm process that is necessarily context-specific. Italy opined that historical evidence shows that many countries that abolish the death penalty first go through a suspension (in law or practice). Abolition without a moratorium is usually because of a traumatic event. Although not prohibited in international law per se, the historical evolution indicates that the international community is moving towards a definitive phasing out of capital punishment. Denmark noted that this global trend is supported by the various international tribunals (including the International Criminal Court), which, although dealing with the most heinous crimes, have no power to impose the death penalty.

30. Cuba reported that, having ceased to apply the death penalty in 1959, it was obliged to reinstate it following an increase in external attacks against the country. This notwithstanding, the Government trusts that the day will come when the right conditions exist for abolishing the death penalty. Ireland reported in detail on how abolition has taken place incrementally, with three legislative enactments starting in 1964 and culminating in constitutional abolishment in 2002. Slovenia outlined how the relatively large number of criminal offences leading to the death penalty in the country after the Second World War was slowly reduced; the perceived need for

such a penalty became less urgent, and the last execution took place in 1959. Tunisia also reported that although the death penalty has not been abolished, the President's refusal to sign death warrants has led to a de facto abolition since 1991. Amnesty International has opined that, if the death penalty is eventually to be abolished, it is only fair to stop executing persons in the meantime while allowing societies time to engage in informed debate.

IV. Protection of the rights of those facing the death penalty

31. The death penalty is not prohibited under international law; however, its use is severely restricted. The standards that must be met before the death penalty can be appropriately applied are set out in international human rights law, in particular in article 6 of the International Covenant on Civil and Political Rights, and article 37 (a) of the Convention on the Rights of the Child. These standards seek to protect the rights of those facing the death penalty. In an annex to its resolution 1984/50, the Economic and Social Council set out the minimum international standards that provide safeguards guaranteeing protection of the rights of those facing the death penalty. The Council elaborated upon the standards in its subsequent resolutions 1989/64 and 1996/15. In its resolution 62/149, the General Assembly called upon all States that still maintain the death penalty to respect those standards and to provide the Secretary-General with information relating to their observance. Information provided by member States is reported below under each of the nine standards (as grouped by the Council).

A. Use only for the most serious crimes

32. In countries that have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences. The Human Rights Committee has established a significant jurisprudence on the application of article 6 (2) of the International Covenant on Civil and Political Rights, including the definition of "most serious crimes". The Committee has consistently rejected the imposition of a death sentence for offences that do not result in the loss of life. Similarly, the Commission on Human Rights, in its resolutions on the death penalty, called on States to ensure that

> that the notion of "most serious crimes" does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent acts such as financial crimes, religious practice or expression of conscience and sexual relations between consenting adults nor as a mandatory sentence.[16]

In his report to the fifth session of the Human Rights Council, in March 2008, the Special Rapporteur on extrajudicial, summary or arbitrary executions considered in detail the concept of "most serious crimes", concluding that "the death penalty can only be imposed ... in cases where it can be shown that there was an intention to kill which resulted in the loss of life.[17]

[16] Resolution 2005/59, para. 7 (f), and others.

[17] A/HRC/4/20, para. 53.

33. In its response, the Government of Belarus indicated that its criminal code allows the application of the death penalty as an exceptional measure for certain particularly serious crimes, including crimes involving the loss of life, high treason, conspiracy to seize State power and sabotage. The death penalty is not imposed for the planning or attempted commission of a crime. The 1999 criminal code reduced the number of crimes for which the death penalty may be applied from 29 to 14, and for 2 of them only in wartime.

34. Kuwait also indicated that the death penalty is imposed only for the most serious offences. Latvia responded that the death penalty remains applicable only for murder with especially aggravating circumstances committed in time of war; however, abolition of the penalty in all circumstances is currently under way. In its response, Tunisia indicated that capital punishment is applied only in cases of premeditated homicide or homicide accompanied by aggravating circumstances.

35. A number of States members of the European Union drew attention to the minimum standards set out in the "Guidelines on European Union policy". In considering what constitutes "the most serious crimes", the standards state that "the death penalty should not be imposed for non-violent financial crimes or for non-violent religious practice or expression of conscience".

36. In January 2008 the Islamic Republic of Iran introduced the death penalty for certain offences related to the production of pornographic materials.

B. Principle of legality

37. Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby. A number of States referred to the "Guidelines on European Union policy", which state that capital punishment should not be carried out in violation of a State's international commitments, nor should it be imposed as an act of political revenge in contravention of the minimum standards, for example, against perpetrators of a coup d'état.

38. In its reply, Tunisia stated that the principle of legality is entrenched in both the Constitution and in the criminal code.

C. Specific groups

39. Persons below 18 years of age at the time of the commission of a crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, new mothers or persons who have become insane. In its resolution 1989/64, the Economic and Social Council recommended that States establish a maximum age beyond which a person may not be sentenced to death or executed. It also recommended eliminating the death penalty for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentencing or execution. Article 37 (a) of the Convention on the Rights of the Child expressly forbids the application of the death penalty or life imprisonment to individuals under 18 years old.

40. Algeria reported that the death penalty may not be carried out on a pregnant woman or woman nursing an infant under 24 months old, the seriously ill or insane, nor individuals under the age of 18 years. Belarus indicated that under its criminal code the death penalty cannot be applied to individuals who were under the age of 18 at the time of the commission of a crime, to women or to men who reach the age of 65 before the sentence is handed down. Botswana reported that the death penalty cannot be applied to an individual under 18 years old, nor to a pregnant woman.

41. In its contribution Cuba indicated that the death penalty may not be imposed on individuals under the age of 20 years, nor on women who were pregnant at the time of committing a crime or when they are sentenced (the Government notes that the death penalty has not been imposed on any woman in Cuba since 1959). There is no criminal responsibility for individuals who suffer a mental condition that renders them unable to understand the significance of their actions or to control their behaviour.

42. In its response, Kuwait reported that the death penalty is not imposed on persons under the age of 18 at the time of the commission of a crime, nor on pregnant women, new mothers or the mentally incapacitated. Latvia reported that no women or children can be sentenced to death. Tunisia also reported that the death penalty is not applied to individuals under 18 years of age, nor to pregnant women until after they give birth. Mentally incapacitated individuals are not prosecuted through the criminal justice system, including for crimes that could result in a death sentence. New Zealand voiced specific concern that, in clear violation of international obligations, children are being sentenced to death and executed in a number of countries.

43. Human Rights Watch noted that in international treaty and customary law the prohibition on the death penalty for crimes committed by persons under age 18 at the time of the offence was well established. According to Human Rights Watch, five States are known to have executed juvenile offenders since 2005: Islamic Republic of Iran (16 executions), Saudi Arabia (3 executions), Sudan (2 executions), Yemen (1 execution) and Pakistan (1 execution). Reference is made to progress in recent years in the United States of America, Pakistan and China towards abolishing the juvenile death penalty, with varying levels of success. In March 2005 the United States Supreme Court ruled that the execution of juvenile offenders violated the United States Constitution's ban on cruel and unusual punishment.[18] In 2000, Pakistan issued a juvenile justice ordinance banning the death penalty for persons under 18 at the time of the offence. In 1997, China amended its Criminal Code to ban executions of persons under 18 at the time of the crime.

44. However, Human Rights Watch also noted that the number of known executions of juvenile offenders by those who retain the practice remains high: 29 known executions over the last five years, including 7 in 2007 alone. An even larger number of juvenile offenders are on death row. It opined that in a majority of cases, these sentences are the result of poorly enforced legislation, long periods of pretrial detention and low levels of birth registration that make it difficult for children to prove their age at the time of the offence, and criminal justice systems that fail to provide children with fundamental protections. Among other things, Human Rights Watch recommends that States ensure that children in conflict with the law have

[18] *Roper v. Simmons*, 543 U.S. 551 (2005).

prompt access to legal assistance, including assistance in proving their age at the time of an alleged offence, and require police, prosecution and judicial authorities to record the ages of children who come before them.

45. The Japan Federation of Bar Associations has referred to the provision in the Japanese code of criminal procedure prohibiting the execution of inmates "in a state of insanity". The Federation raised concerns that it is impossible to verify whether this provision is observed, as medical records are not available to inmates or their doctors.

D. Clear evidence

46. Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.

47. Cuba referred to the most stringent requirements of proof in death penalty cases. Tunisia indicated that the trial judge must be satisfied according to the appropriate standard of criminal proof.

E. Use pursuant to a final judgement and a fair trial

48. Capital punishment may be carried out only pursuant to a final judgement rendered by a competent court after a legal process that gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings. In its resolution 1989/64, the Economic and Social Council recommended that States allow time and facilities for the preparation by the accused of their defence, including the adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases. The Council has also encouraged States, in applying the death penalty, to bear in mind principles, guidelines and standards adopted and developed by the United Nations in the area of criminal justice, as well to ensure that defendants who do not sufficiently understand the language used in court are fully informed, by way of interpretation or translation, of all the charges against them and the content of the relevant evidence considered in court. Finally, the Council has called upon States to allow adequate time for the preparation of appeals to a court of higher jurisdiction and for the completion of appeal proceedings, as well as petitions for clemency.[19]

49. A number of States referred to the "Guidelines on European Union policy", which include a provision regarding the right of an accused to contact a consular representative.

50. In July 2007 the Human Rights Committee adopted general comment No. 32 on article 14 of the International Covenant on Civil and Political Rights (right to equality before courts and tribunals and to fair trial).[20] In the general comment, the

[19] Resolution 1996/15.

[20] CCPR/C/GC/32.

Committee surveyed the extent of States' obligations under article 14 of the International Covenant on Civil and Political Rights, and made a number of observations relevant to the application of the death penalty. It reaffirmed the position that scrupulous respect for the guarantees of fair trial is particularly important in trials leading to the imposition of the death penalty, and thus that the imposition of a sentence of death upon conclusion of a trial in which the provisions of article 14 have not been respected constitutes a violation of the right to life (article 6 of the International Covenant on Civil and Political Rights).[21]

51. Botswana reported that the law requires that the accused in death penalty cases be provided a fair trial within a reasonable time by an independent and impartial court established by law. Cuba indicated that trials are held in public before a court consisting of five judges. If the accused has not appointed defence counsel, one will be provided by the court. Appeals are heard by the highest court, which, in effect, undertakes a new trial. In Kuwait, counsel is provided at no cost to the accused. The Libyan Arab Jamahiriya also provides for a right to defence at all stages of the investigation and trial.

52. Tunisia reported on a number of fair trial guarantees in relation to the application of the death penalty, including the use of a *chambre d'accusation* to re-examine the entire investigative procedure before the case is considered by the trial chamber. All persons suspected of having committed a crime subject to the death penalty have the right to legal counsel. Death penalty cases are handled by criminal courts comprising five judges, of whom at least four must agree with the sentence (the required majority for non-capital cases is three).

53. The Japan Federation of Bar Associations has drawn attention to a 2006 revision of Japanese Prison Law such that the meetings of death-row inmates with counsel must be attended by prison officials (in the absence of justifiable reasons). All correspondence between an inmate and counsel is subject to censorship by prison officials. The Federation also draws attention to its concerns relating to access to counsel of those sentenced to death. Once the death sentence is confirmed, death-row inmates cannot use the court-appointed attorney counsel for filing an appeal for retrial or amnesty. In the case of indigent inmates, the lack of access to counsel at this stage of proceedings is critical.

54. According to Hands off Cain, on 22 May 2008 the Supreme Court and the Ministry of Justice of China jointly issued regulations on the protection of defence lawyers' roles in capital cases to ensure that defendants' legal rights were upheld.

F. Right of appeal

55. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory. A number of States referred to the "Guidelines on European Union policy", which refer to the right, where applicable, of anyone sentenced to death to submit an individual complaint under international procedures. The death sentence should not be carried out while the complaint remains under consideration through those procedures.

[21] Ibid., para. 59.

56. In its contribution, Botswana indicated that there exists a right of appeal from death sentences handed down by the High Court to the Court of Appeal. Cuba reported that appeals on death sentences are automatic, as is the case in Kuwait and the Libyan Arab Jamahiriya. In Trinidad and Tobago, according to the Government's response, appeals of death sentences are allowed but not mandatory. The appeal must be lodged within 14 days, and if the basis of the appeal is a question of fact (as opposed to law), the permission of the Court of Appeal or fiat of the trial judge is required. Tunisia also provides for automatic appeal, with the trial court's dossier referred to the Supreme Court for examination. The Japan Federation of Bar Associations has referred to a recent tendency in Japan (where appeal of a death sentence is not mandatory) whereby the accused does not file an appeal against a death sentence (or even withdraws the appeal filed by his attorney), resulting in an increasing number of capital sentences becoming final without review by a higher court.

G. Seeking pardon

57. Anyone sentenced to death shall have the right to seek pardon or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.

58. The Government of Belarus drew attention to provisions in the criminal code allowing commutation to life imprisonment as the result of a pardon. The President's authority to pardon is entrenched in the Constitution of Belarus. In Botswana, there exists a right to appeal death sentences to the President for commutation or lesser sentence on the advice of the Advisory Committee on the Prerogative of Mercy. Cuba reported that the Supreme Court, if it upholds a death sentence, is obliged by law to forward the record of proceedings to the Council of State, which is the body with jurisdiction to exercise the right of pardon or to commute the death sentence to a prison sentence.

59. In its contribution, Kuwait indicated that anyone sentenced to death has the right to seek a pardon or commutation of sentence. In the Libyan Arab Jamahiriya (according to the Government), persons condemned to death have the right to seek commutation from the Court or to request that they be allowed to make amends in return for their lives being spared. This right, however, is subject to agreement with the family members of the victim and payment of blood money by agreement between the parties. Morocco reports that in the current situation of de facto moratorium a royal pardon is granted to everyone sentenced to death and their sentences are commuted to life imprisonment. Trinidad and Tobago referred to the Advisory Committee on the Power of Pardon established under the Constitution. That Committee, which receives a report from the trial judge in every death penalty case, provides non-binding advice to the Minister of National Security and the President on clemency. Tunisia reported that the prosecutor must bring every sentence of death to the attention of the Secretary of State for Justice, who will present it to the President for possible pardon.

60. The Japan Federation of Bar Associations referred to the absence of the possibility (once the death penalty is confirmed) of the sentence being commuted to life imprisonment with labour. Though an amnesty system exists, it has very rarely been applied in cases of capital punishment, the last instance being in 1975.

H. Stay of execution pending appeal or pardon

61. Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence. In its resolution 1996/15, the Economic and Social Council called upon States to ensure that officials involved in decisions to carry out an execution are fully informed of the status of appeals and petitions for clemency of the prisoner in question. The Human Rights Committee found a grave breach of a State party's obligations under the First Optional Protocol to the International Covenant on Civil and Political Rights in circumstances where, despite the Committee's request for a stay of execution until it could consider the complaint, the State party nonetheless proceeded to execution.[22]

62. Cuba indicated that, as all death sentences are forwarded to the Council of State for consideration of commutation, no execution may be carried out until such time as the Council of State has reached a decision (or the deadline for the decision has passed). The Government also drew attention to recent commutations of almost all those death sentences.

63. Trinidad and Tobago referred to the country's appeal process, the highest court of appeal being the Judicial Committee of the Privy Council. No execution can be carried out until all appeals are finalized or until all applications for permission to appeal have been refused. By law, appeals are to be held expeditiously. Tunisia reported a specific provision of the criminal procedure code suspending execution of a death sentence pending appeal. Trinidad and Tobago drew attention to the provision in its criminal procedure that execution cannot take place until the appeal is concluded or until the period during which appeals must be lodged (14 days) has expired.

64. The Japan Federation of Bar Associations indicated that the filing of an appeal for retrial or for amnesty in Japan is not considered to be a cause of suspension of the execution, and that the Committee against Torture has expressed concern in this regard.[23]

I. Minimum suffering

65. Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering. In its resolution 1996/15, the Economic and Social Council urged States to effectively apply the Standard Minimum Rules for the Treatment of Prisoners in order to keep to a minimum the suffering of prisoners under sentence of death and to avoid any exacerbation of such suffering. A number of States referred to the "Guidelines on European Union policy", which state that the death penalty may not be carried out in public or in any other degrading manner.

66. The Human Rights Committee has consistently found that the mandatory imposition of the death penalty for any crime constitutes an arbitrary deprivation of life and thus a violation of article 6 of the International Covenant on Civil and Political Rights.[24] This position was supported by the Commission on Human

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[22] *Piandiong v. Philippines*, communication No. 869/1999, views adopted on 19 October 2000.

[23] CAT/C/JPN/CO/1, para. 20.

[24] *Eversley Thompson v. Saint Vincent and the Grenadines*, communication No. 806/1998, views adopted on 18 October 2000.

Rights,[25] as well as the Special Rapporteur on extrajudicial, summary or arbitrary executions, who was also of the view that mandatory death sentences risk cruel, inhuman or degrading punishment.[26] The Committee against Torture has addressed the conditions of detention for those on death row, which may amount to cruel, inhuman or degrading treatment not only as a result of physical circumstances, but also as a consequence of the mental anguish caused by an excessive length of time on death row.[27]

67. The Libyan Arab Jamahiriya reported that execution by certain means such as the electric chair, lethal injection or toxic gases is not acceptable. Botswana listed a number of conditions under which those sentenced to death are detained, including separate detention from other inmates, access to family visits and regular medical examinations. The Japan Federation of Bar Associations has referred to the lack of prior announcement of executions, such that the condemned person is informed only approximately an hour before it occurs. No prior announcement is made to the family or the attorney. According to the Federation, the lack of prior announcement deprives inmates of opportunities to challenge the legitimacy of executions and imposes enormous everyday fear on the inmates.[28]

68. According to Hands off Cain, in January 2008 the Islamic Republic of Iran announced that the head of the judiciary must approve any executions to be carried out in public and banned all pictures of the events. However, this directive is not being fully complied with across the country.

V. Conclusions and recommendations

69. **The solid and long-standing trend towards global abolition of the death penalty identified in previous reports of the Secretary-General to the Economic and Social Council and to the Human Rights Council continues. The contributions of States to the present report suggest that the establishment of a moratorium on the application of the death penalty is a key step towards eventual de jure abolition of this form of punishment.**

70. **For States that maintain the death penalty, the standards to safeguard the rights of those sentenced to death are of crucial importance in ensuring that the punishment is carried out in a manner consistent with States' international legal obligations.**

71. **While differences persist among Member States as to the appropriateness of the use of the death penalty, the information presented in this report suggests that further work could usefully be carried out on specific restrictions on the use of capital punishment, such as the prohibition on the execution of certain groups of individuals or the prohibition on torture and other cruel, inhuman or degrading treatment or punishment in the application of the death penalty, including the conditions of detention of those on death row.**

[25] Resolution 2005/59, para. 7 (f).
[26] See A/HRC/4/20.
[27] See CAT/C/ZMB/CO/2.
[28] CAT/C/JPN/CO/1, para. 19.